EMPATI MAT

v.

PP

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
WAN ADNAN MUHAMAD JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: Q-05-49-04]
31 JULY 2009

CRIMINAL LAW: *Penal Code - Section 300 - Section 301 - Section 302 - Murder - Conviction based on confession in caution-statement - Whether voluntary - Incriminating parts of confession, whether corroborated - Information leading to fact discovered - Evidence Act 1950, s. 27 - Evidence given by anonymous caller to police - Whether hearsay and inadmissible - Whether s. 114(g) Evidence Act 1950 should be invoked against prosecution for not producing caller - Defence of alibi, whether established*

CRIMINAL LAW: *Penal Code - Section 300 - Section 301 - Murder - Intention - Intention to kill human being - Whether sufficient - Whether must be intention to kill an indentified person*

EVIDENCE: *Confession - Caution-statement - Voluntariness - Whether proved - Voire dire - Incriminating parts of confession, whether corroborated*

EVIDENCE: *Information leading to fact discovered - Evidence Act 1950, s. 27 - Admissibility and proof - Reception of circumstantial evidence*

EVIDENCE: *Adverse inference - Prosecution not calling witness - Evidence of anonymous caller to police - Whether s. 114(g) Evidence Act 1950 should be invoked against prosecution - Whether such evidence hearsay - Whether tendered as to truth*

CRIMINAL PROCEDURE: *Defence - Alibi - Whether established on balance of probabilities - Independence of witnesses*

This was an appeal from the decision of the High Court convicting the accused of murder and sentencing him to death under s. 302 of the Penal Code ('the Code'). The accused was convicted based primarily on his confession as contained in the caution-statement he gave to the police after his arrest. In the

caution-statement, the accused had admitted that he had wanted to kill someone else but had (using his father's shot gun) mistakenly shot and killed the victim in the instant case. The trial judge admitted the caution-statement after a trial within a trial. The main defences raised by the accused were that: (a) the caution-statement was involuntary and therefore inadmissible; and (b) he had an alibi.

Before the Justices of Appeal herein, counsel for the accused contended that the trial judge had erred in deciding: (1) that the accused gave and/or signed his caution-statement voluntarily, considering that the accused is an Iban whilst the recording officer is a Bidayuh; (2) that the accused was not oppressed or induced into giving and/or signing the caution-statement; (3) that there was sufficient proof that the fatal injuries sustained by the deceased were caused by the accused; (4) to admit the hearsay evidence (given by an anonymous caller to the investigation officer) that the accused's father was overheard confiding in a teacher that his son (who has a disfigured lip) had mistakenly shot someone; (5) not to draw an adverse inference against the prosecution under s. 114(g) Evidence Act 1950 ('the Act') for failing to call the said anonymous caller to testify and corroborate that relevant part of the investigation officer's evidence; and (6) to reject the accused's alibi.

Held (dismissing the appeal)
Per Wan Adnan Muhamad JCA delivering the judgment of the court:

(1) The trial judge had properly considered the issues of voluntariness and oppression and, as such, his findings of fact thereof should not be disturbed. The *voire dire* had rightly established that there was no compulsion or inducement. (paras 16, 19, 32)

(2) The trial judge was correct in his findings of fact that: (a) the accused had led the police party to his parents' room whereat one live and two spent cartridges were recovered; (b) the accused did tell the police party that he had used one of the cartridges to shoot the deceased; (c) the two spent cartridges were fired from the accused's father's shot gun (which had been seized by the police three days after the homicide) as confirmed by the government chemist; and (d) the two pellets that were recovered from the deceased's chest came from one of the two spent cartridges. (paras 22

& 42)

(2a) The prosecution's evidence confirmed and corroborated what the accused said in his caution-statement as to how the deceased sustained the fatal injuries. The evidence showed that the deceased died as a result of the injuries caused by the accused. (paras 26, 29)

(2b) The prosecution could rely on s. 27 of the Act *vis-a-vis* the facts discovered by the police in consequence of the information given by the accused to the police whilst in custody. (para 25)

(3) The trial judge was right in concluding that it was not possible for the prosecution to produce the said anonymous caller. Also, the prosecution was not relying on his evidence to prove the truth of the statements he made but only the fact that they were made. The trial judge was right in not invoking s. 114(g) of the Act against the prosecution. (para 23)

(4) The irresistible inference from the evidence was that the accused had intended to cause the death of a person on the night in question. The trial judge was correct in deciding that to constitute murder, the intention to kill a human being is sufficient and that it does not necessarily have to be an identified person. (paras 27, 28, 30, 31 & 33)

(5) The evidence of the accused's four alibi witnesses did not have the effect of proving, supporting, corroborating or establishing the accused's alibi in any way. Their evidence, whether individually or as a whole, could not establish that the accused was at the family farm or paddy fields in Semujok on the night in question. The defence of alibi was rightly rejected by the trial judge. (paras 36, 37, 38 & 43)

(6) There was no misdirection by the trial judge on the facts or the law. Consequently, his findings thereof should not be disturbed. (para 41, 44 & 45)

[Conviction and sentence affirmed.]

***Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan dari keputusan Mahkamah Tinggi menyabitkan tertuduh kerana membunuh dan mengenakan hukuman mati ke atasnya di bawah s. 302 Kanun Keseksaan ('Kanun'). Tertuduh telah pada utamanya disabit berdasarkan pengakuan salahnya seperti yang terkandung dalam pernyataan beramaran yang telah diberikan oleh beliau kepada polis selepas penangkapannya. Dalam pernyataan beramaran itu, tertuduh mengaku bahawa beliau ingin membunuh orang lain tetapi telah (dengan menggunakan senapang patah ayahnya) tersilap menembak dan membunuh mangsa dalam kes semasa. Hakim perbicaraan menerima pernyataan beramaran selepas satu perbicaraan dalam perbicaraan. Pembelaan-pembelaan utama yang dibangkit oleh tertuduh ialah bahawa: (a) pernyataan beramaran itu tidak diberi dengan rela dan, oleh itu, tidak boleh diterima; dan (b) beliau mempunyai alibi.

Di hadapan Hakim-hakim rayuan di sini, peguam tertuduh mendakwa bahawa hakim perbicaraan telah khilaf apabila menentukan: (1) bahawa tertuduh memberi dan/atau menandatangani pernyataan beramarannya dengan rela, memandangkan bahawa tertuduh ialah seorang Iban sementara pegawai merekod seorang Bidayuh; (2) bahawa tertuduh tidak ditindas atau didorong memberi dan/atau menandatangani pernyataan beramaran itu; (3) bahawa terdapat keterangan yang mencukupi bahawa kecederaan-kecederaan fatal yang dialami oleh si mati telah disebabkan oleh tertuduh; (4) untuk menerima keterangan dengar cakap (yang diberi oleh seorang pemanggil yang namanya tidak diketahui kepada pegawai penyiasatan) bahawa ayah tertuduh telah didengar berkata kepada seorang guru bahawa anaknya (yang mempunyai pencacatan pada bibirnya) telah menembak seorang dengan silap; (5) tidak membuat inferens bertentangan terhadap pendakwaan di bawah s. 114(g) Akta Keterangan 1950 ('Akta') kerana gagal memanggil pemanggil yang namanya tidak diketahui untuk memberi testimoninya dan untuk menyokong bahagian relevan keterangan pegawai penyiasatan itu; dan (6) untuk menolak alibi tertuduh.

Diputuskan (menolak rayuan)
Oleh Wan Adnan Muhamad HMR menyampaikan penghakiman mahkamah:

(1) Hakim perbicaraan telah menimbangkan dengan betul isu-isu kerelaan dan penindasan dan, oleh itu, dapatan-dapatan faktanya tidak seharusnya diusik. *Voire dire* itu telah

membuktikan bahawa tidak ada pemaksaan atau dorongan. A

(2) Hakim perbicaraan betul dalam dapatan-dapatan faktanya bahawa: (a) tertuduh telah membawa pihak polis kepada bilik ibubapanya di mana satu kartrij hidup dan dua kartrij-kartrij yang telah digunakan dijumpai; (b) tertuduh telah B memberitahu pihak polis bahawa beliau telah menggunakan salah satu kartrij untuk menembak si mati; (c) dua kartrij yang telah digunakan itu telah ditembak daripada senapang patah ayah tertuduh (yang telah dirampas oleh polis tiga hari selepas homisid itu) seperti yang diesahkan oleh ahli kimia C kerajaan; dan (d) dua gentel-gentel yang telah didapati daripada dada si mati berpunca daripada salah satu kartrij-kartrij yang digunakan.

(2a) Keterangan pendakwaan mengesahkan dan menyokong apa D yang dikatakan oleh tertuduh dalam pernyataan beramarannya mengenai bagaimana si mati mengalami kecederaan-kecederaan yang fatal itu. Keterangan menunjukkan bahawa si mati meninggal dunia disebabkan kecederaan-kecederaan yang diakibatkan oleh tertuduh. E

(2b) Pendakwaan boleh bergantung atas s. 27 Akta *vis-a-vis* fakta-fakta yang dijumpai oleh polis akibat daripada informasi yang diberikan oleh tertuduh kepada polis semasa berada dalam tahanan. F

(3) Hakim perbicaraan juga betul dalam memutuskan bahawa ia mustahil bagi pendakwaan untuk mengemukakan pemanggil yang namanya tidak diketahui itu. Juga, pendakwaan bukan bergantung atas keterangannya untuk membuktikan kebenaran pernyataan-pernyataan yang dibuat olehnya tetapi G hanya fakta bahawa mereka telah dibuat. Hakim perbicaraan betul apabila tidak menggunakan s. 114(g) Akta terhadap pendakwaan.

(4) Inferens yang tidak dapat dibendung daripada keterangan H ialah bahawa tertuduh telah ingin menyebabkan kematian seseorang pada malam berkenaan. Hakim perbicaraan adalah betul apabila memutuskan bahawa untuk bermaksud membunuh, niat untuk membunuh seorang manusia adalah mencukupi dan ia tidak semestinya seorang yang telah I dikenalpasti.

(5) Keterangan keempat-empat saksi alibi tertuduh tidak

A mempunyai efek membuktikan, menyokong atau menunjukkan alibi tertuduh dalam apa cara pun. Keterangan mereka, sama ada berasingan atau keseluruhan, tidak dapat membuktikan bahawa tertuduh ada di ladang keluarganya atau sawah padi di Semujok pada malam yang berkenaan. Pembelaan alibi
B telah ditolak dengan betul oleh hakim perbicaraan.

(6) Tidak ada apa-apa salah arahan oleh hakim perbicaraan atas fakta-fakta dan undang-undang. Oleh yang demikian, dapatan-dapatannya tidak seharusnya diusik.

C *[Sabitan dan hukuman diesahkan.]*

Case(s) referred to:
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 ***(refd)***
D *Che Omar Mohd Akhir v. PP [2007] 3 CLJ 281 FC* ***(refd)***
Dato' Mohktar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Ismail Hussin v. PP [1953] 1 LNS 33 ***(refd)***
Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 ***(refd)***
E *Juraimi Husin v. PP [1998] 2 CLJ 383 CA* ***(refd)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Muniandy & Anor v. PP [1973] 1 MLJ 179 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
F *PP v. Mohd Bandar Shah Nordin & Anor [2008] 4 CLJ 859 CA* ***(refd)***
PP v. Sainal Abidin Mading [1998] 3 CLJ 41 HC ***(refd)***
Sunny Ang v. PP [1966] 2 MLJ 195 ***(refd)***
Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 ***(refd)***

Legislation referred to:
G Criminal Procedure Code, s. 402A
Evidence Act 1950, s. 114(g)
Penal Code, ss. 300, 301

For the appellant - Baru Bian; M/s Baru Bian & Co
For the respondent - Awang Armadajaya Awang Mahmud DPP

H *Reported by Gan Peng Chiang*

JUDGMENT

I **Wan Adnan Muhamad JCA:**

[1] The accused was convicted for murder and was sentenced

to death by the High Court Judge sitting in Sibu, Sarawak on 26 June 2004. The charge against him reads:

> That you on the 13th day of August, 1998 at about 2115 hours at road one kilometer from the bazaar Tanjung Manis, Sarikei, in the state of Sarawak, did commit murder by causing the death of one CHAN TAU SOON (m), and that you have committed an offence punishable under section 302 of the Penal Code.

[2] The facts are extracted from the learned trial judge ground of judgment. On 13 August 1998 at about 9pm Chan Tau Soon (the deceased) and Fook Kong Min (PW6) were travelling on a motorcycle belonging to one Teo Tia Tsim (PW5) along a road leading to Tanjung Manis bazaar from the Jaya Fuda factory at Tanjung Manis, Sarikei. The deceased was riding the motorcycle while Fook Kong Min (PW6) was riding pillion. While on their journey, PW6 heard a sound, which he described as "phiang". On enquiring from the deceased what the sound was, and being told "nothing", PW6 requested the deceased to stop. On stopping, the deceased complained to the PW6 of feeling numb in his right hand and then of unbearable pain before collapsing. PW6 then sought help from a passing motor-cyclist, Samuel ak William Jackson (PW7) who went to Tanjung Manis and returned with a police vehicle driven by Constable Hellery ak Tampang (PW8), together with another motor-cyclist Arman bin Hussaini (PW9). The deceased was put into the police vehicle and taken to the Tanjung Manis clinic, where he was attended to by the Hospital Assistant there, Mohamad Ali Fauzi bin Hassan (PW10), who testified that when the deceased was brought in at about 9.30pm on 13 August 1998, he was unconscious with undetectable blood pressure but had a slow pulse rate. PW10 applied an intravenous drip to the deceased's left hand and requested that he be transferred to the Sarikei Hospital.

[3] According to the PW6, the incident took place along a stretch of tarred road where there were no shops or residential houses, only bushes on either side of the road. PW6 said that when he and the deceased left Jaya Fuda factory that night, it was drizzling.

[4] Dr Nelson Yap Chie Chong (PW3), the Medical Officer at Sarikei Hospital testified that on 13 August 1998 at about 10.30pm, he examined a young man of chinese descent at the Accident and Emergency department of the hospital. PW3

A concluded that the person he examined was brought in dead due to gunshot wounds because there were no vital signs from the deceased, no pulse rate, no blood pressure, no cardial monitoring and neurological reflexes. PW3 observed six bullet wounds over the body: three to the lateral side of his right arm and three other
B through and through wounds.

[5] On 14 August 1998 an autopsy was conducted at the mortuary of the Sarikei Hospital, on the person PW3 had seen the night before. The autopsy was conducted by Dr. Myint Soe
C (PW22) a pathologist attached to the Sibu Hospital, while PW3 assisted him. Inspector Mohd Azmi (PW11) was also present during the autopsy. Before the autopsy was performed, the body of the deceased was identified to all present by Lim Kok Peng (PW4), who was the uncle of the deceased.

D

[6] According to PW22 as a result of his external and internal examinations of the deceased, he found that severe chest injury with massive bleedings from gunshot wound caused by two pellets to the chest was sufficient in the ordinary course of nature to
E cause death of the deceased. PW22's testimony regarding the cause of the deceased's death was not seriously challenged in the cross-examination.

[7] On 14 August 1998 at about 2am, Corporal Mahmud @ Hamdan bin Majidin (PW1) received a report about the death of
F the deceased from Teo Tia Taim (PW5) *vide* Tanjung Manis Rpt/ 36/98). At about 9am on the same day PW24 went to the scene of the incident with a few police personnel and PW6. He prepared a sketch plan (P24(A)) and took photographs of the scene.

G

[8] In the vicinity of the crime scene, PW24 noticed foot-prints leading to and from a spot some 10 meters off the left side of the road, which PW24 believed to be the "ambush position" where the person who shot the deceased lay in wait. However, the mud-
H blocks with the accused's foot imprint were not produced as exhibits at the trial because according to PW24 the mud blocks dried and cracked, causing the outline of the foot prints to be lost, but before the mud block cracked photos were taken of them, which photos were produced as exhs. P21(L), (M),(N) and (O).
I The police continued their investigation to trace the suspect in the

murder of the deceased. The police made a search and inquiry in all the villages and factories in the vicinity area of the incident. A

[9] On 16 August 1998, two shot guns were seized from Rumah Jugah, which belong to one Tawan and Mat anak Gabong (DW5); the accused's father. B

[10] On 21 August 1998 at about 3pm, while at Tanjung Manis police station, PW24 received an anonymous telephone call from a member of public about an Iban father asking a teacher what will be the punishment could be imposed on his son who had mistakenly shot someone and had informed him that the son had disfigured lip. After receiving the said call PW24 did initial investigation at Rumah Jugah, and found out that DW5's son had disfigured lip. On the same day, the police party went to Rumah Jugah and subsequently the accused was arrested. C D

[11] On 29 August 1998, the cautioned statement of the accused (P19) was recorded by ASP Jackson @ George Johem (PW15). When the prosecution sought to adduce the contents of P19 as evidence, the defence objected to its admissibility on the ground that it was not given voluntarily. After trial within a trial the trial judge admitted P19. E

[12] On 30 August 1998, based on information in P19, PW24 and police party brought the accused to the crime scene. At the scene, the accused pointed out to PW24 how he had made his way to, and left the ambush position, after the shooting. PW24 then prepared sketch plan (P25 (A) & (B)), and photographs were taken (P17 (a)-(g)). From the scene, the accused was brought to Rumah Jugah. The accused showed the police where he kept the shotgun and the cartridges after the incident on the night of 13 August 1998. A search list (P26) was prepared by PW24 and a copy issued to Mat anak Gabong. F G

[13] On 11 September 1998, Lau Cheng Siew @ Low Cheng Siew (PW2) the chemist did firing three rounds on the cartridges seized by the police from Rumah Jugah using exh. P11(a). PW2 made a comparison on the characteristic mark with those cartridges marked exh. P9(a) and P10(a) and found them to be similar. H

[14] In relation to the shot gun (P11(a)) which PW2 had examined, although the shot gun was not in good condition he I

found it serviceable and managed to test fire all the three rounds using the same shot gun.

[15] In summary, what the accused said in P19 was that on the day before the incident (12 August 1998), he was sending his younger brother to school at about 7am when he met a former classmate named Kusaimi bin Kawi who jeered him about his ugly looks. The accused said he was deeply hurt by Kusaimi's jeering which had been going on since their school days and so he decided to teach him a lesson for what he had done all this time. The accused said that on 13 August 1998 he decided to kill Kusaimi bin Kawi by ambushing him along a road leading to Tanjung Manis town. So at about 6pm on the same day he took a shot gun owned by his father and departed from his longhouse on a motorcycle and headed for the road leading to Tanjung Manis town. According to him when he took the shot gun, his parents were not at home. On arrival at the place he selected, the accused said he hid his motorcycle at the road side then made his way to a spot some 20 feet away from the road side, where he took up an ambush position and loaded the shot gun with one of three cartridges he was carrying. According to the accused, Kusaimi usually went to Tanjung Manis town every night and the accused was able to recognize the light and sound of the motorcycle Kusaimi frequently used. The accused said that it was dark and drizzling that night and that several motorcycle passed by his ambush position but from the sound of their engines he knew it was not Kusaimi's. The accused said that at about 9pm he saw and heard two motorcycles heading towards Tanjung Manis. He recognized the sound of the second of the two motorcycles which was travelling behind as that used by Kusaimi, so he waited until Kusaimi's motorcycle was opposite him before he fired and shot in the direction of his target. The accused said he then observed the rider of the motorcycle fell down about 20 feet from where he had fired his shot. The accused said that on moving forward a little from his ambush position he heard voices speaking in Chinese from the spot where the motorcycle had fallen. It was then he realized that he might have mistakenly shot someone else. He said he did not go to check on that person as he was frightened. Instead, he made his way back to his longhouse (Rumah Jugah). On arrival back at the longhouse between 10pm and 11pm, the accused said he found his father fast asleep. He then put back the shot gun in the room where it

was kept by his father. He also put back the cartridges and empty casing where they were kept by his father. The next day (14 August 1998) he overheard people talking about a person who had been shot dead the previous night. He then confided and told his father that on the previous night he had shot someone, not on purpose but by mistake.

[16] I am satisfied that the trial judge after holding a trial within trial held that the accused's cautioned statement (P19) had been given voluntarily and without compulsion or inducement. When the main trial resumed, the accused's cautioned statement was admitted into evidence through the recording officer; ASP George Joehem (PW15).

[17] During the hearing of the accused's appeal before this court his counsel Mr. Baru Bian contended that the trial judge had erred in deciding that the accused's cautioned statement (P19) was given voluntarily. He said the accused is an Iban and the Recording Officer (RO) is a Bidayuh. And there was no evidence that the RO was fluent in iban language. Mr. Bian urged this court to ignore P19 because according to him even though accepted, is of little value; it was Kusaimi bin Kawi that the accused intended to shoot.

[18] Mr. Bian further submitted that the accused also emphatically denied that the statement was given voluntarily when he signed P19. He said that the accused in his testimony, pointed out that it was his signature appearing at bottom left of the pages in P19 but the accused was asked to sign on those without being told of the purposes for signing. According to Mr. Bian the accused was told to sign on exh. PI9 because he was promised by TWTPW3 that he would be released immediately. Mr. Bian said the accused was handcuffed and wearing only his underwear, without any shirt or trousers and was barefooted when he was brought before the police officer to whom he gave his statement. Mr. Bian urged this court to look at the accused's testimony during examination in chief.

[19] Upon perusal of the grounds of judgment I find that the trial Judge had considered the issue of voluntariness and the alleged oppressive circumstances (p. 681 of the appeal record). Therefore I am not going to disturb his finding of facts as they were appropriately dealt. In his ruling (p. 340 of the appeal record) the

trial judge said that the handcuffs were removed from the accused's hands at a point in time before he gave his statement remained intact and unaffected. It is my view that the learned judge made his finding of fact. See *Francis Antonysamy v. PP* [2005] 2 CLJ 481); In *Juraimi Husin v. PP* [1998] 2 CLJ 383, it was held that:

> A statement made under s. 113 of the Criminal Procedure Code should be made voluntarily and the burden lies upon the prosecution to prove the voluntariness of such statement beyond a reasonable doubt, the test applicable being partly objective and partly subjective. Once a confession based on such a statement is admitted, a conviction may be based solely on its strength. However, as a matter of practice and prudence, the court ought to look for corroboration of the incriminating parts of the confession. On the facts of the case, there was nothing improper in the manner in which the statement of the first appellant was recorded by the officer in charge of the investigations. The statement was therefore made voluntarily – the product of a free mind, untainted by any illegitimate pressure.

[20] Mr. Bian further contended that the trial judge had erred in his finding that there was sufficient evidence to prove that the injuries sustained by the deceased were caused by the accused and in admitting the evidence of a anonymous caller implicating the accused's father, as this is a hearsay evidence. This anonymous caller never testified at the trial to corroborate what the Investigating Officer (PW24) had said on the matter. For this, adverse inference must be drawn against the prosecution under s. 114(g) Evidence Act 1950, for failing to do so.

[21] Mr. Bian also drew attention to the evidence of the PW24 that three days after the incident, PW24 had seized two shot guns from Rumah Jugah, one of which (P11(a)) belonged to the appellant's father, Mat anak Gabong (DW5). P11(a) was already in police custody when PW24 received the anonymous call on 21 August 1998, about an iban father with a son with a disfigured lip, making enquiries from a teacher about what the punishment could be if his son had mistakenly shot someone. It was this information that led to the arrest of the accused and to the subsequent cautioned statement given by the accused.

[22] On the above issue the learned trial judge in his judgment said that, the accused led the police party to the 2nd room

occupied by his parents in Rumah Jugah and retrieved three cartridges, two of which spent (P9(a) and P10(a)). The accused told the police party that of the two cartridges, he had used the rusty cartridge (P9(a)) to shoot the deceased. Both exhibits were sent to the Chemistry Department at Kuching for examination. The evidence of the Chemist (PW2), confirmed that P9(a) and P10(a) were fired from P11(a). PW2 also testified that the two pellets (which were sent to him in a bottle in envelope (E2)) were shot gun pellets of shot size 'SG'. PW22 testified that he recovered these two pellets from the deceased's chest during the autopsy. I also feel that this is a finding of facts by the learned trial judge.

[23] Regarding the anonymous call which PW24 received, the learned trial judge said it was not possible for the prosecution to produce the caller as a witness. The prosecution did not seek to rely on it to prove the truth of the statement, but the fact that it was made. As such the learned trial judge was of the opinion that it was not a case in which adverse inference might be drawn against the prosecution under s. 114(g) Evidence Act 1950. My view is that the learned trial judge did not misdirect himself on this issue.

[24] In *Pang Chee Meng v. PP* [1992] 1 CLJ 39; ([1992] 1 CLJ (Rep) 265), Abdul Hamid Omar LP said at p. 42 (p. 269) regarding the said s. 27 as follows:

> The rationale behind this section revolves on the basis that if a fact is actually discovered in consequence of information given by the accused in custody some degree of guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence overriding the Criminal Procedure Code and other written law.

[25] In this case, the fact discovered concerns the place from where the spent cartridge that was used to shoot the deceased which was produced and the accused's knowledge of that fact, and the information supplied by the accused relating distinctly to the fact thereby discovered was the information about which cartridge had been used by the accused to shoot the deceased and where the accused had put the spent cartridge on his return to Rumah Jugah.

[26] The evidence adduced by the prosecution pointed irresistibly

to the conclusion that the two pellets recovered from the deceased's body did come from one of the two cartridges. The admission of the accused that he had used one of those cartridges (rusty cartridge) (P9(a)) to shoot the deceased; that he had used his father's shot gun (P11(a)) to fire the cartridge; that he fired the shot gun at the deceased at the crime scene on the night in question; that the pathologist (PW22) recovered the two shot gun pellets from the deceased's body; that the Chemist (PW2) confirmed that the said pellets which he examined were shot gun pellets and were fired from P11(a) which he found serviceable. All the evidence above, tended to confirm and corroborate what the accused had said in his cautioned statement about how the injuries came to be sustained by the deceased, therefore sufficiently proved that the deceased died as a result of the injuries he sustained were caused or was the result of the act of the accused.

[27] The learned trial judge had sufficiently considered the accused's cautioned statement (P19). He opined that in order to constitute the offence of murder, the intention to kill that must be proved is not necessarily an intention to kill an identified person, it is sufficient if an actual intention to kill a human being is proved (*Ismail bin Hussin v. PP* [1953] 1 LNS 33; *PP v. Sainal Abidin Mading* [1998] 3 CLJ 41). What was required is that the prosecution has to prove that the accused intended to cause death of the deceased. Since intention concerns the state of mind of a person, its existence is to be deduced from the evidence.

[28] Reverting to the evidence that has been adduced in the present case, it showed that on the night in question the accused had set out from his longhouse taking with him his father's shot gun. He then selected an ambush position along a straight stretch of the road, and then waited until he was sure that the person he wanted to shoot had arrived at his ambush position before taking aim to discharge the shot-gun at his target. The irresistible inference is that his intention was to cause death to that other person.

[29] The accused also had said that he came to realize that he may have mistakenly shot the wrong person because when he moved closer to the spot where he saw the rider of the motorcycle fall, he heard voices speaking in chinese. As a matter of fact the deceased and his pillion rider Fook Kong Min (PW6) are chinese. The deceased and PW6 had conversed with each

other before the deceased collapsed. While the accused said in his cautioned statement that on the day after the shooting he had heard people talking about someone being shot, he did not say that he heard that it was a chinese was shot dead. Unless the accused had been at the scene on the night of the 13 August 1998, he would not have the knowledge that the voices he heard were speaking in chinese so as to enable him to suspect that he had shot the wrong person.

[30] According to the learned trial judge (p. 714 of the appeal record), "the fact that the accused had said he wanted to kill Kusaimi bin Kawi, while it may provide a purpose or reason for the accused being at the scene of crime that night, and the fact that Kusaimi bin Kawi does not know the accused, does not in any way detract from the fact that the accused had an actual intention to kill a human being that night. Whether it was Kusaimi bin Kawi or it was Emran bin Husaini (PW13) whom the accused wanted to kill, the circumstances surrounding the shooting of the deceased, shows that the accused had an actual intention to kill a human being that night. And the fact that the accused subsequently came to realize that he might have shot the wrong person would not in any way negative the intention to kill a human being because s. 301 of the Penal Code provides that:

> If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

[31] After perusing the learned trial judge grounds of judgment, I am satisfied that he had given due considerations to all requirements under the provision of s. 300 of the Penal Code. The trial judge said that the deceased has been identified as Chan Tau Soon and the deceased died as a result of injuries inflicted by the accused. The accused had the intention to cause death. I am in agreement with his finding. See *Tham Kai Yau & Ors. v. PP* [1977] 1 MLJ 174; *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359.

[32] In this appeal it is clear that P19 was admitted by the trial court after TWT proceeding and the court found it to be

A voluntarily made. It was admitted as a result of a finding of facts by the trial court. I am not going to disturb P19: see *Francis Antonysamy v. PP (Supra)*. From the evidence in P19 coupled with the circumstantial evidence given by prosecution witnesses the learned trial judge found that *prima facie* had been made out
B against the accused. Again I find that the said judge came to the right conclusion.

[33] For the above reasons, I am satisfied with the finding of the trial judge that the prosecution had proved the element of *'mens*
C *rea'* of the charge against the accused, and had established a *prima facie* case against him and called him to enter his defence.

[34] The accused denied causing death of the deceased or murdering him on the night of 13 August 1998. He then put
D forward an alibi saying that he spent that night with his father and mother as well as his auntie, uncle, grandfather and grandmother at their padi hut. The accused did not say where he was planting padi or where the hut that he had spent that night was situated, but he said the padi fields were about 2 hour boat ride from
E Rumah Jugah.

[35] In his defence, the accused (DW1) said that a week before he was arrested he and his father (DW5) were at padi field's hut at a place called Semujok to plant padi. He denied his presence at the crime scene on 13 August 1998. In support of his alibi
F defence he called four other witnesses. They were Tuai Rumah Jugah Ak Anjai (DW2), Chiki Anak Tawan (DW3), Timah Ak Remang (DW4) and Mat Ak Gabong (DW5). They were amongst a list of 13 names given by him in his Notice of Alibi dated 14 July 1999 pursuant to s. 402A of the Criminal Procedure
G Code.

[36] The learned trial judge in his lengthy and exhaustive grounds of judgment was of the opinion that the evidence of DW2, DW3, DW4 and DW5 did not have the effect of proving, supporting,
H corroborating or establishing in any way the alibi of the accused. He said the evidence show that the longhouse folk of Rumah Jugah, including the accused's family own padi fields at Semujok and Menjawan which is situated quite far from their longhouse, which they would plant-up with wet padi in August of each year.
I Their evidence also shows that when they went to their farms, they would stay there overnight, but there is no conclusive

evidence about how long they would remain at their fields, usually until their food rations ran out which usually lasted for about one week. But there was also evidence that even after two or three days at the farm, the longhouse folks would return to their longhouse if the need arose. With regard to the crucial date of 13 August 1998, the trial judge found that the evidence of DW2, DW3, DW4 and DW5 whether individually or together as a whole, was unable to establish that the accused was at his padi field on that date. According to the learned judge all of them are the accused's relatives staying in the same Rumah Jugah.

[37] According to learned trial judge for the defence of alibi, the accused only needs to establish his alibi on a balance of probabilities, (*Dato' Mohktar bin Hashim & Anor v. PP* [1983] 2 MLJ 232). After having considered all the evidence relating to his alibi, the learned trial judge found that the accused has failed to establish that on the night of 13 August 1998, he was at his padi field at Semujok. He rejected the accused's defence of alibi.

[38] On the submission by Mr. Bian that the trial judge had erred in not accepting the evidence of the defence's witnesses ie, DW2, DW3, DW4 and DW5 on the balance of probability as credible to prove, support, corroborating or establishing the defence of alibi, I feel they are devoid of merit. The learned trial judge in assessing the accused's credit at the end of the case for the defence, including what the accused had said in his re-examination, had found that the accused had not been able to explain the material contradictions between what was stated in his cautioned statement (P19) and his evidence in court and that his credits stands impeached. There was no conclusive evidence that what he said about him being at the padi hut on the material night. I am in agreement with the trial judge when he found that what was said by DW2, DW3, DW4 and DW5 whether individually or together as a whole, did not have the effect of proving, supporting, corroborating or establishing in any way the alibi of the accused. With regard to the crucial date of 13 August 1998 the evidence of none of the witnesses was able to establish that the accused was at his padi field on that date. In this case his defence of alibi failed to cast any doubt on the prosecution's case. My view is that the learned trial judge was right to hold that the prosecution had proved its case beyond reasonable doubt

against the accused as charged. It is my considered opinion that the trial judge did not err in his findings.

[39] In this appeal the prosecution relied on the admission by the accused in P19 and other circumstantial evidence which the learned judge accepted. With regard to the acceptance of circumstantial evidence I would like to highlight certain authorities which our courts heavily relied time and time again. See *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130; *Dato' Mohktar bin Hashim v. PP (Supra); Sunny Ang v. PP* [1966] 2 MLJ 195; *Muniandy & Anor v. PP* [1973] 1 MLJ 179; *PP v. Mohd Bandar Shah Nordin & Anor* [2008] 4 CLJ 859.

[40] In *Jayaraman Velayuthan & Ors. v. PP (Supra)*, Suffian LP at p. 133 quoted Thomson CJ said in *Chan Chwen Kong v. PP* [1962] 1 LNS 22 as follows:

> That evidence was entirely circumstantial and what the criticism of its amounts to is this, that no single piece of that evidence is strong enough to sustain conviction. That is very true. It must however be borne in mind that in cases like this, where the evidence is wholly circumstantial what has to be considered is not only of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is; is that rope strong enough to hang the prisoner?

At p. 309 Suffian LP had this to say:

> And there is no rule that, where the prosecution is based on circumstantial evidence, the judge must, as a matter of law, give further direction that the facts proved are not only consistent with the guilt of the accused, but also as to be inconsistent with any other reasonable conclusion.

And at p. 310 he stated:

> In our view the irresistible conclusion test only seems to place on the prosecution a higher burden of proof then in a case where it depends on direct evidence, for in fact to apply the one and one only irresistible conclusion test is another way of saying that the prosecution must prove the guilt of the accused beyond reasonable doubt.

[41] I do not find any misdirection by the learned trial judge on facts and on law. It is trite that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly against the weight of evidence: per Nik Hashim FCJ at

p. 294 in *Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281; see also *Andy Bagindah v. PP* [2000] 3 CLJ 289.

[42] With regard to the evidence of DW5 (the accused's father) the trial judge directed his mind by giving due consideration that DW5 had used the two cartridges (P9(a)) and P10(a)) to shoot wild boar and monkey with. He felt that DW5's testimony on how the two cartridges were used was inconsistent with the evidence adduced by the prosecution. He considered DW5's evidence with suspect as DW5 was not independent witness.

[43] The learned trial judge rejected the accused's defence. He gave plenty of reasons in his judgment and he reasoned out why he did not accept the evidence of the defence witnesses. According to the trial judge's finding the said witnesses are from the accused long house and padi field which the accused said he was at the material time, is only two hour boat ride. It is his factual finding that the said witnesses evidence as a whole or individually failed to establish that the accused was at his padi field on that night.

[44] The trial judge also rejected the evidence of the accused as a mere denial. After giving due considerations to whole evidence before him, he found that the defence failed to raise reasonable doubt to the prosecution's case. He also found that the prosecution had proved its case beyond reasonable doubt. He found him guilty and convicted him. Death sentence was imposed on the accused.

[45] For all the above reasons, this court unanimously dismissed this appeal and affirmed the conviction and sentence of the trial court.

[46] My learned brothers James Foong Cheng Yuen, JCA (currently FCJ) and Sulong Matjeraie, JCA having read this judgment in draft agree with the reasons expressed herein and to the decision given in this case.